Belmar/PAG Limited Partnership
v.
City of Nashua
Docket No. 21029-04PT

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Bellavance Realty Corp.
v.
City of Nashua
Docket No. 20916-04PT

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Community Bank & Trust Co.
v.
City of Nashua
Docket No. 20924-04PT

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Chittenden Corp. D/B/A Ocean Bank
v.
Town of Raymond
Docket No. 21036-04PT

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Chittenden Corp. D/B/A Ocean Bank
v.
Town of Stratham
Docket No. 21038-04PT

RECONSIDERATION ORDER

This Reconsideration Order addresses the April 4, 2006 motion for reconsideration ("Motion") of the board's March 8, 2006 order ("Consolidated Order") filed by the Taxpayers in the above captioned cases and the City of Nashua's April 10, 2006 objection to the Motion ("Objection"). After review of the Motion and Objection and further deliberation, the board grants the Motion and reverses the Consolidated Order dismissing the above-captioned appeals for the following reasons.

TAX 201.37 provides that a reconsideration motion can be granted for limited reasons primarily if the board's initial decision was erroneous in either fact or law. The common issue submitted in these appeals and addressed in the Consolidated Order is whether the Taxpayers' lack of signature on the abatement application, in violation of TAX 203.02(d) and RSA 76:16,III, warrants dismissal of the appeals. For the reasons laid out in the Consolidated Order, the board concluded it did. However, after reconsideration, the board reverses its Consolidated Order and concludes its findings reached beyond the explicit provisions of the statutes relative to abatement filings.

The primary reason for granting the Motion is that despite there being the requirement of a signature by the taxpayer in both the statutorily created form and the board's rules, there is no explicit penalty or sanction stated if the applicant's signature is not obtained. Without this clear legislative authority, the board finds its Consolidated Order exceeded the statutory provisions for the abatement application filing procedures.

The court has frequently stated the board's authority is strictly statutory. See Appeal of Gillin, 132 N.H. 311,313 (1989), and Appeal of Sunapee, 126 N.H. 214, 216 (1985). RSA 76:16 states that selectmen may abate any tax after a person has filed in writing by March 1 for an abatement on the form set out in paragraph III. Paragraph III provides the abatement application

form shall be prescribed by the board of tax and land appeals and shall include "a place for the applicant's signature with a certification by the person applying that the application has a good faith basis and the facts in the application are true." Further, TAX 203.02(d) requires that an attorney or agent not sign the abatement application for the taxpayer[s], but rather the taxpayer[s] shall sign it themselves. However, missing from either the statutory or rule provisions is any sanction of dismissal if such signature is lacking. Further RSA 76:16,III(a) requires the abatement form include "[i]nstructions on completing and filing the form"; yet none of the form instructions caution taxpayers that an incomplete form (such as lack of a signature) will result in dismissal of the abatement request.

The legislature has, in other places in the tax statutes, specifically provided for such a loss of appeal if certain actions are not properly performed. See RSA 74:7-a (lack of filing a timely inventory precludes appeal of property tax); RSA 74:17 (refusal to admit inspection by assessors results in loss of appeal rights); RSA 72:23-c, II (failure by exempt institutions to provide information requested by assessors may result in the loss of the exemption); and RSA 72:33, III and VI (failure by taxpayers to file financial statements for determining eligibility for personal exemptions or willfully making false statements on such applications may result in loss of the exemption).

It is instructive to note in Gillin, the court reversed the board's ruling because the taxpayers had refused the appraiser's access to their residence, the taxpayers had lost their right of appeal. "We find no [statutory] provision granting the board the power to limit the taxpayers' right to appeal in a no-inventory town, even where they have failed to assist the appraisers in the performance of their duties." Gillin at 313. Subsequently in 1991, the legislature enacted RSA 74:17 specifically providing for lack of appeal if entry is refused. On reconsideration, we

find a similar sanction for lack of a taxpayer's signature on an abatement application must be provided by the legislature for the taxpayers to lose their appeal right.

Concluding, as the Consolidated Order did, that lack of a taxpayer's signature is akin to statutory filing deadlines is also unsupported by the plain reading of the statute. Timely filing requirements are very explicit in the statute, and are supported by case law. Without a specific statutory extension, lack of timely filing a document precludes action on that document and any appeal. See RSA 76:16 (taxpayers must apply in writing by March 1 "and not afterwards" for an abatement); RSA 74:7-a (inventory may be filed after April 15 until May 31 if accident, mistake or misfortune is shown); see also Appeal of Brady, 145 N.H. 308, 309-310 (2000); Appeal of Estate of Van Lunen, 145 N.H. 82, 86 (2000); and Phetteplace v. Town of Lyme, 144 N.H. 621, 625 (2000). Again, however, the statutes and case law are silent as to whether lack of a taxpayer's signature is equally as fatal to the taxpayer.

Rather, upon reconsideration, the board concludes the lack of signature is more similar to the technical defect nature of a taxpayer providing only a brief explanation of the reason for seeking an abatement addressed in GGP Steeplegate, Inc. v. City of Concord, 150 N.H. 683, 686 (2004) where the court stated the tax abatement scheme "should be construed liberally in the advancement of the rule of remedial justice which it lays down." (Citation omitted.)[1] If the Consolidated Order were not reversed, the taxpayers would be penalized without explicit authority to do so and contrary to the remedial scheme the abatement process was set up to allow "auditing" of municipal assessments.

Board Member Shamash, in his Dissenting Opinion, cites three cases in support of denying the Motion: Thayer v. State Tax Commission, 113 N.H. 113 (1973); Pelham Plaza v.

[1] While RSA ch. 74 inventory filing provisions have statutorily changed since 1967, the court noted in a broad fashion in H.J.H., Inc. v. State Tax Commission, 108 N.H. 203, 205 (1967) that "cases construing our tax abatement statutes over a long period of time do not encourage the slothful, are designed to penalize the contumacious but also indicate some concern for the taxpayer."

Town of Pelham, 117 N.H. 178 (1977); and Appeal of Taylor Home, 149 N.H. 96 (2003). We believe a distinction between the facts in those three cases and the ones on appeal here is that the taxpayers lost their right of appeal in those three cases for lack of timely submitting the document in question (inventory form, filing fee, and charitable exemption appeal) rather than the document being timely filed but not signed by the taxpayer.

In contrast to the lack of explicit penalty to taxpayers for lack of an abatement application signature, the legislature has given clear directive to the board in RSA 71-B:7-a (and the implementing rules, TAX Part 207) for investigating and determining what, if any, sanctions are appropriate for tax consultants that do not comply with the law to the detriment of their clients. As noted in the Consolidated Order, the board has initiated a "board review" (TAX 207.02 (a)(1)) in In re: Mark Lutter, Docket No.: 21527-06OS as to Mr. Lutter's lack of compliance with the statute and rules in these and other appeals before the board. This statutory framework exists for any penalty and sanctions to rest with the tax consultant for failure to comply with the law as opposed to resting on the shoulders of his clients, the taxpayers, for his lack of compliance.

The board's reconsideration is not impacted or swayed by the remaining arguments contained in the Motion. The board concludes it erred solely on the issue of whether there was statutory authority for granting the dismissals, not on the Motion's other arguments such as the legislative history and the mention of hypothetical situations in the Consolidated Order.

Further, it should be made clear that granting the Motion should not be interpreted that the board in any fashion condones the lack of substantive compliance with the abatement requirements contained in RSA 76:16. Taxpayers and their representatives should diligently comply with the statutory requirements of filing abatements with municipalities so the municipalities can substantively review and respond to such requests.

Given the importance of this issue and the obvious divergent view points evidenced by the parties, the Consolidated Order, and this Reconsideration Order and Dissenting Opinion, the legislature may wish to address this issue in the future to provide clarity as to any sanctions for lack of compliance with the RSA 76:16 filing requirements. It is the legislature's prerogative, not this board's, to determine such policy matters that could potentially have a fatal affect on a taxpayer's appeal rights.

Further, to ensure the parties understand the effect of this Reconsideration Order, two additional comments are in order. First, this Reconsideration Order does not affect AGC Corporation v. Town of Londonderry, Docket No.: 20984-04PT. In the board's Consolidated Order, the board denied the Town of Londonderry's motion to dismiss for the reasons so stated and those stand as no rehearing motion was filed by either party in that appeal. Second, because this Reconsideration Order is now unfavorable to the other municipalities (Nashua, Raymond and Stratham), any appeal of this Reconsideration Order must be in accordance with RSA ch. 541 by those municipalities.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

DISSENTING OPINION

I respectfully dissent from the majority's decision to overturn the board's Consolidated Order (by granting the Motions). I believe the Consolidated Order was correctly decided for the reasons explained below.

First, the statute (RSA 76:16, I) is clear in requiring the filing of an abatement application by a "person aggrieved" by March 1, "and not afterwards, in writing on the form set out in paragraph III." Paragraph III, (g) contains two specific and related requirements for the abatement application: (i) the "applicant's signature" (not the signature of his attorney or tax consultant ("Agent"), as in this case); and (ii) "a certification by the person applying that the application has a good faith basis and the facts in the application are true."

As noted on page 2 of the Consolidated Order, the board's rules make the prohibition of a substituted signature even clearer: "Signature. The Taxpayer shall sign the Abatement Application. An attorney or Agent shall not sign the Abatement Application for the Taxpayer." TAX 203.02(d). A tax representative such as Mr. Lutter (or any other "attorney or Agent," for that matter) is neither the "applicant" nor a "person aggrieved" under RSA 76:16.

Paragraph IV of RSA 76:16 does give the applicant an alternative to using "the form prescribed in paragraph III." All of the board members agree, however, that this paragraph does not mean the clearly stated requirements of the statute, including signature and certification by the applicant, do not apply (contrary to the thrust of one of the taxpayers' arguments regarding the "plain and ordinary meaning" of this provision). Paragraph IV plainly and simply means a taxpayer can supply the information required (including signature and certification) by filing an abatement application with the municipality without using the printed form supplied by the board for this purpose.

Because the "plain and ordinary meaning" of the statute, RSA 76:16, is clear, no recourse to its legislative history is necessary. Even if the limited legislative materials attached to the Motion are examined, however, they fail to mention, let alone discuss, the question of whether a failure to comply with the statutory requirements for an abatement application (including the clear signature and certification obligations noted above) must be excused or forgiven instead of resulting in dismissal of an appeal.

Second, this question of whether dismissal is an appropriate consequence was clearly identified, discussed and resolved in the Consolidated Order (at pp. 7-9). I am simply not persuaded the absence of an explicit provision in the statutes authorizing dismissal for failure to comply with RSA 76:16, III(g) supports the granting of the Motion. In Thayer v. State Tax Commission, 113 N.H. 113, 114 (1973), the supreme court stated: "It is elementary that the plaintiff's remedies are statutory and that he can succeed only by following the statutory conditions." (Citation omitted.) (Emphasis added.) The "statutory conditions" for obtaining a tax abatement include complying with the signature and certification requirements in the application submitted to the municipality.

In Thayer, an abatement appeal was dismissed because the taxpayer's petition failed to allege compliance with RSA ch. 74 and the taxpayer further refused to pay the required $10 filing fee (now $65), which the court found are two independent statutory requirements contained in RSA 76:16-a. It bears emphasis that no explicit statutory provision existed prescribing dismissal as a stated consequence for either of the above two failings in the taxpayer's appeal. Nevertheless, the court had little difficulty finding dismissal was appropriate.

While RSA 74:7-a now provides that failure to file the inventory form required in RSA ch. 74 results in loss of "the right to appeal," that statute was enacted by the legislature (in May, 1977, with an April 1, 1978 effective date) some five years after the decision in Thayer

affirming the dismissal. Accord, Pelham Plaza v. Town of Pelham, 117 N.H. 178, 181-83 (1977) (affirming denial of tax abatement appeal by the board of taxation):

> "[C]ompliance with RSA chapter 74 [at the municipal level] is a condition precedent to the right to appeal. If the board finds the taxpayer in violation of this chapter, it must deny the abatement. RSA 76:16-a (Supp. 1975) does not confer upon the board discretion to permit an appeal by a noncomplying taxpayer."

Pelham was also decided before RSA 74:7-a was enacted or became effective. These cases are direct examples that negate the argument that an explicit statutory provision prescribing dismissal or loss of appeal rights is necessary. As held in Pelham, dismissal is mandatory and the board has no "discretion" to permit an RSA 76:16-a appeal to continue when there is non-compliance with the tax abatement statutes.

To this day, refusal to pay the statutory filing fee for an appeal, as in Thayer, is a ground for dismissal (where, of course, there is no waiver of the fee "due to financial hardship"), even though there is no statutory provision that I am aware of explicitly stating this consequence. Cf. TAX 501.01 and 501.02.

On this issue of statutory authority, RSA 76:16-a, I gives the board its authority and jurisdiction to hear and decide tax abatement appeals, but this statute applies only when ("If") the municipal "selectmen neglect or refuse to so abate, in accordance with RSA 76:16." (Emphasis added.) The taxpayer signature and certification requirements are, as noted above, contained in RSA 76:16 and are part of the requirements for an abatement application at the municipal level. RSA 76:16, I gives the municipality the discretion to abate ("may abate") an assessment if the taxpayer complies with the statutory requirements for filing an abatement application and "for good cause shown."

In other words, compliance with the statutory filing requirements is a "condition precedent" for an abatement to be acted upon at the municipal level, cf. Pelham, 117 N.H. at 181,

and cannot be excused after an appeal is filed with the board. Within this statutory framework, I believe dismissal is the sanction provided by the legislature, even if this so-called 'penalty' or 'punishment' is not stated 'explicitly, and is a sanction the board should continue to apply when appropriate unless and until the legislature enacts a different outcome.

There is, in fact, more recent case authority supporting the enforcement of applicable filing requirements involving not only 'when' (timeliness) but 'what' (content) is filed, even if the sanction or consequence is dismissal of an appeal. In Appeal of Taylor Home, 149 N.H. 96 (2003), the board's dismissals of separate exemption appeals (for two municipalities, Laconia and Sandwich) were upheld by the supreme court. The dismissals resulted from the inadvertent failure of a law firm (acting as agent for the taxpayer) to file, on its behalf, charitable exemption appeals with the board (on a form specified in the board's rules, TAX 204.03(b), or an alternative document that include "all of the information" stated on that form, TAX 204.03(c)): instead, the law firm completed and filed the board's abatement appeal forms, but further mentioned the taxpayer's "charitable status" and stated (in Section G of each form) as market values: "n/a tax exempt." Id. at 97-98. These were clear indications, of course, of the taxpayer's desire to seek an exemption, even though it neglected to file "companion [exemption] appeals" which it had referenced in the abatement appeal documents. Id. at 98, 100-01.

Several months after the filing deadline, the taxpayer's attorney "moved to reform" the appeal documents to state the taxpayer "also appealed the failure of the municipalities to grant charitable exemptions," but the board denied the requested leave to reform and dismissed the exemption appeals. Id. In upholding the dismissals, the supreme court gave effect to the board's rules (TAX 204.03) "which set forth the requisite content of appeals brought pursuant to RSA 72:34-a." Id. at 100 (emphasis added). Among other things, the taxpayer failed to include a "copy of the exemption application and a statement of the municipality's action on the

application," procedural requirements prescribed by board rule, TAX 204.03(c) (5), not by statute. Id. The supreme court further disagreed with the taxpayer's argument in Taylor Home, also advanced by the taxpayers here, that if the municipality is 'put . . . on notice' regarding what is intended by a filing, 'technical' compliance with the board's rules should not be required. Id.

As in Taylor Home, I believe it is incorrect to find or imply compliance with statutory and regulatory requirements is somehow not necessary or must be excused if the municipality had "notice" of what a taxpayer would have done if advised of the lack of compliance in a timely fashion. The basis for dismissal is even stronger here because in Taylor Home the board's own rules provided for an exception for "non-conforming documents" filed with the board, id. at 99, but no parallel rules have been cited, or appear to exist, for non-conforming documents filed with a municipality. Imposing such an additional requirement on the municipality, where no such rule exists, is unwarranted.

A further reference to Taylor Home is in order. In comparison to RSA 76:16, I and III, RSA 72:34-a, the exemption appeal statute, does not specify the content of the document that must be filed (other than that it must be "in writing" and filed with either the board or the superior court); nor does this statute specifically authorize the board to prescribe a form for the document. Yet, the supreme court had no difficulty enforcing the specific content requirements for a proper exemption appeal document enumerated only in the board's rules (TAX 204.03(b) and (c)); the court rejected an argument that compliance with the statute's "in writing" requirement was enough, without actual compliance with the board's rules regarding the specific contents of the "writing." Id. at 99-100.[2]

[2] "The petitioner asserts that because its petitions were 'in writing' and were filed with the BTLA [board] before September 1, 2001, they complied with RSA 72:34-a. This argument ignores the BTLA's regulations, however, which set forth the requisite content of appeals brought pursuant to RSA 72:34-a." (Emphasis added.)

Comparing Taylor Home to the instant appeals, I believe a signature and certification requirement, clearly prescribed by statute and by rule for a municipal abatement application, is a no less "technical" or "formal" requirement or "obstruction" than one detailing what other documents must be attached to the exemption appeal document for it to be valid, a requirement spelled out only in the board's rules. In this regard, the Consolidated Order (at pp. 5 and 6) correctly evaluated the relevance of GGP Steeplegate, Inc. v. City of Concord, 150 N.H. 683 (2004), on which the taxpayers have primarily relied. Nothing in Steeplegate, either directly or by implication, overruled or limited the holding in Taylor Home decided one year earlier. While the tax abatement process is relatively "free from technical and formal obstructions," as stated in Steeplegate, 150 N.H. at 686, the legislature has specifically and definitely mandated the taxpayer signature and certification requirements in RSA 76:16, III (g) and these statutory requirements should be complied with at the municipal level: when a taxpayer (or his agent) fails to comply with these clearly stated requirements, no further laxity is endorsed either by the statutes, the board's rules or prior decisions.[3]

I have also reviewed the board's rulemaking authority under the Administrative Procedure Act. RSA 541-A:22, II provides as follows: "Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as provided by RSA 541-A:13, VI, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to." Thus, the taxpayers' argument questioning the validity of TAX 203.02(d), which is no more than a

[3] As further noted in the Consolidated Order (at p. 6), dismissals based on noncompliance by tax representatives (rather than by taxpayers themselves) are consistent with the board's own decisions in the numerous appeals collectively referenced as "Maloney Associates, Inc." decided nine years before Steeplegate.

restatement (with more emphasis) of the first part of RSA 76:16, III(g), as discussed above, is without merit.[4]

In summary, I believe it is well established that taxpayers (like other parties) bear direct responsibility for what is filed on their behalves and for compliance with basic statutory requirements, including the signature and certification obligations clearly set out in RSA 76:16, III(g), especially when those requirements are also stated in the board's rules and the municipal abatement application form itself; the logical and judicially-recognized consequence for non-compliance is dismissals of the appeals. The case authorities discussed at pages 9 and 10 of the Consolidated Order make it clear a taxpayer is bound by what is done or not done by its attorney or other agent, whether the failure to comply with applicable filing requirements is due to inadvertence or "acts of omission or neglect." Dismissals of the appeals on these grounds would not, of course, foreclose the taxpayers from seeking remedies against their agents for any financial losses resulting from such acts of inadvertence, omission or neglect. I would therefore deny the Motion.

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Albert F. Shamash, Esq., Member

[4] The taxpayers' reconsideration motion references In the Matter of Jacobson & Tierney, 150 N.H. 513 (2004). Neither that case, nor the six subsequent New Hampshire cases that have cited it, involved the question of determining a statute's meaning when it has been further articulated in a duly adopted rule.

CERTIFICATION

I hereby certify that a copy of the foregoing Reconsideration Order and Dissenting Opinion have this date been mailed, postage prepaid, to: Jay L. Hodes, Esq., Hodes Buckley McGrath & LeFevre, 440 Hanover Street, Manchester, NH 03104, Taxpayers Representative; John Bentz, Belmar/PAG Limited Partnership, 4 Cathedral Square Suite 1G, Providence, RI 02903, Taxpayer; Joseph Bellavance, IV, Bellavance Realty Corp., 120 Northeast Boulevard, Nashua, NH 03063, Taxpayer; Brad Giles, Community Bank & Trust Company, 15 Varney Road, Box 59, Wolfeboro, NH 03894; Tony Galluzzo, AGC Corporation, 14 Liberty Drive, Londonderry, NH 03053, Taxpayer; Chris Bishop, Chittenden Bank, 2 Burlington Square, Burlington, VT 05402-0820, Taxpayer; Chairman, Board of Assessors, City of Nashua, PO Box 2019, Nashua, NH 03061; David R. Connell, Esq., Nashua Office Of Corp. Counsel, 229 Main, Box 2019, Nashua, NH 03061; Chairman, Board of Selectmen, Town of Raymond, 4 Epping Street, Raymond, NH 03077; Chairman, Board of Selectmen, Town of Stratham, 10 Bunker Hill Avenue, Stratham, NH 03885; Chairman, Board of Selectmen, Town of Londonderry, 268B Mammoth Road, Londonderry, NH 03053; and Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051, Interested Party.

Date: 5/18/06

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Anne M. Stelmach, Clerk